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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,	)	No. P1300CR20081339
	)	
Plaintiff,	)	Div. 6
	)	
vs.	)	<b>REPLY IN SUPPORT OF</b>
	)	<b>MOTION TO PRECLUDE LATE</b>
STEVEN CARROLL DEMOCKER,	)	<b>DISCLOSED EVIDENCE,</b>
	)	<b>WITNESSES AND EXPERTS</b>
Defendant.	)	<b>AND TO DISMISS THE DEATH</b>
	)	<b>PENALTY AS A SANCTION</b>
	)	<b>UNDER ARIZONA RULE OF</b>
	)	<b>CRIMINAL PROCEDURE 15.7</b>

The State's response correctly acknowledges that it cannot disclose what is not in its possession. That is irrelevant to this motion. The State's repeated failures that are the subject of this motion are related to witnesses, documents and experts known to the State and withheld from the defense, in some cases for up to 15 months. The dates of the State's contact with witnesses and possession of the documents are clearly cited in the

1 motion as is the date of the State's late disclosure. The State does not dispute these dates  
2 or these facts. Nor does it offer any explanation for its repeated failures to comply with  
3 Rule 15.1 or this Court's orders requiring disclosure. There is no acceptable explanation.  
4 The Court should accordingly sanction the State for its conduct and dismiss the death  
5 penalty.

### 6 ARGUMENT

7 The State's citation to *State v. Tucker* to excuse its conduct is revealing. In *Tucker*  
8 the Arizona Supreme Court refused to find an abuse of discretion in a trial court's failure  
9 to sanction the State for disclosure violations. However, the Court made clear that it  
10 encouraged trial courts to use their power to enforce the State's disclosure obligations by  
11 imposing sanctions where the State fails to comply. "[W]e note that it is the trial court's  
12 responsibly to enforce our disclosure rules. ... When necessary, trial judges posses the  
13 power to invoke sanctions ... for failure to comply with discovery rules. *Perhaps the*  
14 *time has come to make clear that these sanctions are not merely a paper tiger.*" *State v.*  
15 *Tucker*, 157 Ariz. 433, 441 (1988) (emphasis added). The Court went on to note that  
16 when a prosecutor violates disclosure obligations, the trial court "is authorized to impose  
17 any sanction it finds just under the circumstances ..." *Tucker*, 157 Ariz. at 439 (internal  
18 quotation omitted).

19 The facts that led to court to find that Mr. Tucker had not suffered prejudice are  
20 notably distinguishable from this case. The *Tucker* Court noted that Mr. Tucker was  
21 aware of all of the witnesses prior to the State's disclosure. Here the State has recently  
22 disclosed witnesses and experts about which Mr. DeMocker was entirely unaware. The  
23 *Tucker* court also found significant that the content of the undisclosed witness was  
24 known to Mr. Tucker. That is also not the case here. In addition to the prejudice Mr.  
25 DeMocker suffers from these late, previously unknown-to-him witnesses and the fact that  
26 he has no idea what some of these witnesses will say, the difference between Mr.

1 Tucker's case involving 29 witnesses and Mr. DeMocker's case, where the State  
2 continues to disclose thousands of pages of previously available documents and now over  
3 150 witnesses is obvious.

4 Reversal of a criminal conviction for discovery violations is a sanction the *Tucker*  
5 Court held may be appropriate. "We have previously voiced our disapproval of the type  
6 of discovery practices exhibited in this case." "While upsetting a criminal conviction is  
7 a drastic step, it is one we may in the future be required to take, pursuant to our inherent  
8 supervisory authority, if it is the only way to deter prosecutorial defiance of court rules."  
9 *Id.* at 441. The State's citation to *Tucker* to excuse its conduct in this case is an implicit  
10 acknowledgement that more is needed from this Court to address and deter the State's  
11 repeated defiance of Rule 15 and this Court's orders. Dismissal of the death notice is a  
12 proper exercise of this Court's discretion and a proper initial step to addressing the  
13 State's repeated, continued and ongoing defiance of Rule 15 and this Court's orders.  
14

15 **I. THE STATE'S FAILURE TO COMPLY WITH THE COURT'S ORDERS**  
16 **REGARDING DISCLOSURE.**

17 Despite Rule 15 and this Court's earlier and January 22, 2010 orders, the State has  
18 failed to disclose the following information to the defense. Much of the State's response  
19 and disclosure on these issues is unintelligible.

20 **A. DPS Disclosure**

21 The State does not address that it took over six months to disclose the DPS protocols  
22 and audits that are required to review and analyze the literally hundreds of reports  
23 prepared by DPS. The failure of DPS and the State provide this information until three  
24 months before trial has prejudiced Mr. DeMocker's ability to review this information and  
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1 the ability of defense experts to properly consider it in advance of trial. The State does  
2 not address or even deny this.

3 The State now admits that DPS does not follow the DNA Advisory Board of Quality  
4 Assurance Standards for Forensic DNA Testing Laboratories, Standard 14, which  
5 provides that forensic DNA laboratories must “follow procedures for corrective action  
6 whenever proficiency testing discrepancies and/or casework errors are detected” and  
7 “shall maintain documentation for the corrective action.” The State now admits, after  
8 ignoring for more than six months repeated defense requests, that DPS does not have a  
9 corrective action log.

10 Additionally, other DPS items that the Court ordered disclosed have still not been  
11 provided. The STR Frequency Tables relied on by DPS for reports dated June 1 and June  
12 11, 2009 have still not been disclosed. This is in spite of the Court’s order requiring  
13 disclosure by January 29. Initially, the State responded that these tables were “part of the  
14 CODIS database and belongs to the FBI.” When it was pointed out that the STR  
15 Frequency Tables relied on by DPS in other testing has previously been disclosed the  
16 State responded that the “disclosure of the allelic frequency tables is through the  
17 following periodicals” and then lists two periodicals. *The listed periodicals were not*  
18 *disclosed.* The State’s continually shifting and evasive response to requests for  
19 documents that were relied on in reaching the conclusions drawn in the referenced reports  
20 is inexcusable and should be sanctioned by this Court. This information is critical to an  
21 independent examination of the results.

1 The State's repeated and continued failures to respond to defense requests and the  
2 Court's orders regarding DPS disclosure has prejudiced Mr. DeMocker's ability to  
3 review and analyze the hundreds of DPS reports, prepare defense experts and otherwise  
4 prepare for trial. The Court should prohibit DPS employees from testifying based on  
5 these repeated failures.  
6

7 **B. Cell Phones**

8 The State's response that its late disclosure of information related to Mr. Knapp's cell  
9 phone is not harmful to Mr. DeMocker's preparation of his defense is disingenuous at  
10 best. The State has repeatedly represented that this information had been disclosed. It  
11 was not. This information is critical to the defense investigation and preparation for trial  
12 as it related to Mr. Knapp's location during the murder. The defense has been requesting  
13 this information for months and was incorrectly told it was already disclosed.  
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16 **C. Rule 15.1 Disclosure Regarding Experts**

17 The Court ordered the State to disclose lists of what documents were relied on by  
18 what experts in compliance with Rule 15.1. The State did not comply with this Court's  
19 order or Rule 15.1. The State complains that it should not be required to identify  
20 documents it intends to rely on prior to trial because it "would not be good trial strategy."  
21 The State should take this issue up with the Arizona Supreme Court who drafted the  
22 Rules of Criminal Procedure. For the time being, however, the Rules require this  
23 disclosure and the Court has ordered it. The State's continued refusal to comply should  
24 be sanctioned by preclusion of these witnesses.  
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1                   1.   *Mr. Echols*

2                   The State should be prohibited from calling Mr. Echols as a witness. The Court  
3 has ordered the State no less than three times to properly comply with Rule 15.1. The  
4 State continues to refuse to comply. The State's response that it provided additional  
5 documents "to be used at trial on January 29" is unintelligible. No list of documents was  
6 provided as ordered by the Court.  
7

8                   Not only did the State fail to meet the January 29, 2010 deadline to identify what  
9 documents Mr. Echols relied on in reaching the conclusions in his report, it also failed to  
10 meet the February 12 deadline to identify by Bates number the documents he would rely  
11 on at trial. Instead, the State did exactly what the Court specifically said would not be  
12 sufficient. It merely provided a list of categories of documents. This list includes  
13 identifiers such as "emails obtained by DPS Computer Forensics Lab" and "any and all  
14 documents obtained from "Anna Young" "John Casalena" and "Cynthia Wallace." The  
15 disclosures do not provide the defense with the notice required under Rule 15.1, and this  
16 Court already advised the State that listing categories of documents was not sufficient.  
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19                   Mr. Echols testimony is related to key issues in the case regarding Mr.  
20 DeMocker's alleged motive and in support of aggravating circumstances. It is now less  
21 than three months before trial and the defense does not know what documents Mr. Echols  
22 will rely on in his testimony. The defense cannot interview Mr. Echols and cannot  
23 prepare its own experts. The State has produced literally thousands of pages of financial  
24 information to the defense and claims that it is using this information as proof of motive  
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1 and in support of an aggravating circumstance. Mr. Echols' previous testimony has been  
2 problematic and beyond the scope of his expertise. In this context, the State's refusal to  
3 comply with Rule 15.1 or this Court's orders which required the disclosure in November  
4 2009 and January of 2010 should be sanctioned by Mr. Echols' exclusion.

6                   2. *Other Experts*

7           The State says it does not intend to call late disclosed expert Ron Castle.  
8           Regardless of the State's present intent with respect to Mr. Castle, given its failure to  
9           comply with Rule 15.1 Mr. Castle should be precluded. The 15.1 disclosure provided by  
10          the State is meaningless as described in the motion.

12          The same applies with respect to Ms. Kossler. She should be excluded based on  
13          the State's failure to comply with Rule 15.1.

14          The 15.1 disclosure for Dr. Pitt is likewise meaningless and does not provide the  
15          defense with what is required under the rule. His testimony should be precluded. The  
16          State does not explain its refusal to comply with the Court's orders regarding Rule 15.1  
17          disclosure as it relates to experts. Without proper disclosure under Rule 15.1 the defense  
18          cannot prepare for or interview Dr. Pitt or investigate, identify or retain our own experts.

19          In another failure to comply with Rule 15.1, the State has never identified for any  
20          expert which aggravators which expert is supporting, nor has the State identified which  
21          documents which experts will be relying on in support of each aggravator.

22          With newly disclosed experts and no idea from the tens of thousands of pages of  
23          disclosure which experts will rely on which documents in support of what theory, the  
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1 prejudice from the State's refusal and delay cannot be overstated. It has interfered with  
2 the defenses' ability to review the State's experts, prepare for their testimony or even  
3 interview them. It has also prevented Mr. DeMocker from reviewing and retaining his  
4 own experts in preparation for trial and these experts should be excluded.  
5

#### 6 **D. Indexing Systems**

7 The Court ordered the State to identify in which DNA and fingerprint indexing  
8 systems the State had searched for unidentified biologic and latent print evidence by  
9 January 29.  
10

##### 11 *1. Fingerprints*

12 The State's response on this issue is frustrating in its level of obfuscation and  
13 obstruction. First, the State responded falsely that no fingerprints of value were found.  
14 When it was pointed out that two prints were run through the Arizona fingerprint index  
15 system, each on one occasion, the State responds that the "indexes searched ... are  
16 included on the report." That response is a further defiance of this Court's orders. If the  
17 answer is that the State has only run the two unknown fingerprints found at the crime  
18 scene once in August of 2008 and has never run them in any system other than the State  
19 database, the State should say so. This is significant exculpatory evidence. The Court  
20 has ordered the State to respond. The State has not. Instead, it has tried to deny any  
21 prints exist and then further avoid answering the question.  
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##### 25 *2. DNA*

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1 The State acknowledges that paperwork is generated when a profile is submitted to  
2 CODIS but refuses to disclose that document. The State should be compelled to disclose  
3 the document created with the profile is submitted to CODIS. This disclosure has already  
4 been ordered by this Court and ignored by the State.  
5

6 **E. Defendant's Statements**

7 The State responds that requiring it to specify each call it will use at trial "is not  
8 proper." On January 22 the Court ordered that for calls through December 31, 2009, the  
9 State disclose those it intends to rely on no later than February 6. The Court ordered that  
10 this disclosure identify by time and date and any other identifying mechanism what calls  
11 the State intended to use. The Court also ordered that for any calls through January, the  
12 State was required to disclose what calls it intended to rely on by February 13<sup>th</sup>. The  
13 Court warned the State at that time that if the calls were not disclosed "they may be  
14 precluded from any type of use at trial." (January 22, 2010 page 106:16-17).  
15

16 The State has not complied with these orders. The State has disclosed over 2700  
17 jail calls. The State defies the Court's order by listing the following: any and all  
18 statements the Defendant made to: Charlotte DeMocker, Katherine DeMocker, Jacob  
19 Janusek, Renee Girard, Barbara O'Non, John farmer, Katherine Dean Warnett, Elizabeth  
20 Minard, Cynthia Woodring, Jennifer Rydezewski, Jackie Wheeler, Laura Spira and Anna  
21 Young. The State further defied the Court's earlier orders and Rule 15.1 by failing to  
22 disclose summaries of these items that were in its possession since 2008 until February of  
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1 2010. The State should be prohibited from relying on any jail calls based on its repeated  
2 and continued refusal to comply with this Court's orders.

3  
4 **F. Forensic Testing**

5 The State's response that it has complied by identifying what items are being  
6 tested without identifying what tests are being done is nonsensical. The Court has  
7 repeatedly ordered the State to provided notice of what testing remained to be done. This  
8 was ordered December 9, 2009 and again on January 22, 2010. The State has not  
9 complied with this Order and continues to refuse to disclose what the Court has ordered it  
10 to disclose.

11  
12 **II. THE STATE'S CONTINUED VIOLATION OF RULE 15.1 AND THIS**  
13 **COURT'S ORDERS FOR TIMELY DISCLOSURE OF WITNESSES,**  
14 **EXPERTS AND EVIDENCE SHOULD RESULT IN EXCLUSION.**

15 The State continues to consistently disclose witnesses, experts and documents to  
16 the defense long after it has possession of the relevant information. This has prejudiced  
17 and continues to prejudice Mr. DeMocker's ability to meaningfully interview most of the  
18 State's witnesses and experts; identify, interview and retain the necessary defense experts  
19 and prepare for trial. The Court should at last sanction the State for its continued  
20 violations of the Rules and this Court's orders.

21 **A. Late-Disclosed and Previously Removed Witnesses Should be Excluded by**  
22 **the Court**

23 Defense counsel relied on the State's representation that it would not be calling  
24 Debbie Hill, Paula Matthew, Dr. Rubin, Dean Shank, Marjorie Powell and Brandon  
25 Stafford. The State's representation about its intent with respect to these witnesses is  
26 clear from the document attached to the Motion. To now add these witnesses is unfair to  
27 Mr. DeMocker. Specficially with respect to Dr. Rubin, the Court should exclude any  
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1 testimony from this witness as his testimony is covered by the doctor patient privilege.  
2 The other witnesses should also be excluded based on the State's prior representations.  
3 At a minimum, the State should be required to make a proffer as to what these witnesses  
4 would testify to.

5 The State should likewise be prohibited from calling the twelve witnesses  
6 disclosed to the defense for the first time three months before trial. These witnesses  
7 include six people identified as from the "back country search team," a person from  
8 dharmamatch.com, Richard Ach, Brian Fagan of the FBI, Gareth Richards from Outdoor  
9 ProLink, and Mark Day and Jonathan Lantz from La Sportiva. The State should be  
10 prohibited from calling these witnesses.

11 Inexplicably, the State argues that it "just recently" learned of the back country  
12 search team. The report of this search from July 6, 2008 was just disclosed in February  
13 2010. (17954). This information was known to the State when the search was conducted  
14 in July of 2008. The delay of 15 months and disclosure three months before a death  
15 penalty trial is inexcusable. These witnesses should be excluded.

16 The State does not even address its failure to make timely disclosure of other  
17 witnesses and it should be prohibited from offering them as witnesses. Richard Ach was  
18 known to and contacted by the State five months before any disclosure was made to the  
19 defense. Brian Fagan of the FBI was contacted by the State ten months before he was  
20 disclosed to the defense as a witness. Reports relating to shoe prints and referring to Mr.  
21 Fagan were held by the State for five months before they were disclosed to the defense.  
22 During the several months the State has had this information and failed to disclose it, the  
23 issues of the shoe print tracking and identification was actively litigated before this Court.  
24 The State should not be permitted to introduce this late disclosed information and experts  
25 at trial. The withholding of this information has severely prejudiced Mr. DeMocker's  
26 ability to investigate, research and retain potential experts and prepare his defense.  
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1 The same is true with respect to newly disclosed witnesses Gareth Richards from  
2 Outdoor ProLink, and Mark Day and Jonathan Lantz from La Sportiva. These witnesses  
3 all came out of the State's undisclosed April – October 2009 contact with the FBI -  
4 information that the State previously had in its possession but failed to disclose. The  
5 State should not be permitted to call these witnesses at trial.

6 The State does not even attempt to explain its repeated failures to timely disclose  
7 this information. This Court is responsible for imposing sanctions for Rule 15 violations  
8 and should properly prohibit the State from using the evidence it has been sitting on  
9 while these precise issues were litigated.

10 **B. Late Disclosed Experts Should be Excluded**

11 The State's four new late disclosed experts and "rebuttal" expert should be  
12 excluded.

13 *1. Commander Mascher should be excluded*

14 Prior to January 22 the State had not identified any tracking expert. On that date  
15 the State identified Detective Kennedy. Then the State has designated Commander  
16 Mascher as a tracking expert. The State had previously represented to the Court and to  
17 counsel that it did not intend to offer any expert testimony from officers. The issue of  
18 tracking shoe prints has been litigated at in limine hearings and the issue of undisclosed,  
19 unqualified officers was also litigated. The State should be precluded from eliciting  
20 "expert" testimony from Cmdr. Mascher.<sup>1</sup>

21 *2. Ron Castle should be excluded*

22 The State says it does not intend to call Mr. Castle. Whether it intends to call him  
23 or not, Mr. Castle should be excluded. The State has now disclosed *six* experts regarding  
24 computers. The Rule 15.1 disclosure for Mr. Castle is only "Blackberry information  
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26  
27 <sup>1</sup> Commander Mascher's qualifications are addressed in the defense reply to Motion to Preclude Testimony of Late  
Disclosed Experts Page and Kennedy.

1 provided by UBS.” This is meaningless and prevents the defense from understanding or  
2 preparing for Mr. Castle’s interview or proposed testimony. Mr. Castle should be  
3 precluded on this basis.

4 *3. Eric Gilkerson should be excluded*

5 Eric Gilkerson should be excluded as an expert. Mr. Gilkerson was known to the  
6 State at or near 5 months ago and yet was not disclosed until February. The report from  
7 Mr. Gilkerson, dated October 22, 2009 was also not disclosed until February. The State  
8 has not disclosed Mr. Gilkerson’s qualifications and lists him only as an “Examiner.”  
9 Testimony and in limine hearings on the issue of shoe prints were ongoing while the  
10 State possessed this evidence and did not disclose it. The State should be prohibited from  
11 offering Mr. Gilkerson as a witness.

12 *4. Susan Kossler should be excluded*

13 The State says not it does not intend to call Susan Kossler as an expert. Again,  
14 regardless of the State’s intent, Ms. Kossler should be excluded as an expert. There is not  
15 a single piece of disclosure provided relating to Ms. Kossler. The 15.1 list of documents  
16 related to Ms. Kossler is meaningless and does not comply with the Court’s order or the  
17 Rules. The defense has no idea what Ms. Kossler’s qualifications are, what her proposed  
18 testimony relates to, what documents she relied on in reaching any conclusions, and what  
19 those conclusions might be. Furthermore, the Court excluded categories of information  
20 during the 404(b) and in limine hearings that would presumably related to the proposed  
21 testimony of a “criminal behavior analyst” so her testimony is likely not permissible  
22 under the Court’s rulings.

23 *5. Dr. Steven Pitt should be excluded*

24 Dr. Steven Pitt should be excluded as an expert witness. The State has failed to  
25 identify what mitigation it expects Steven Pitt to rebut and has explicitly represented that  
26 it does not intend to offer any evidence on a variety of issues to which Pitt’s testimony as  
27

1 a forensic psychiatrist would seemingly relate. There are no reports or documentation  
2 regarding any contact with Dr. Pitt. The 15.1 disclosure relating to Dr. Pitt is  
3 meaningless and does not permit the defense to prepare for or meaningfully interview  
4 him. It lists "any and all contact between Defendant and Carol Kennedy including but  
5 not limited to email, text messages, and handwritten notes," "any and all reports  
6 submitted by other experts," and a "summary of Defendant's and Carol Kennedy's  
7 financial records." The defense has no idea, particularly given the State's earlier  
8 representations during the in limine and 404(b) hearings, what it proposes that Dr. Pitt's  
9 testimony will relate to or rebut. The State should be prohibited from offering Dr. Pitt as  
10 an expert.

11 **C. Late Disclosed Evidence Should Be Excluded.**

12 The State's latest disclosure from February of 2010 includes evidence that has  
13 been in its possession for months, and in some cases, well over a year. The State  
14 incorrectly identifies 17343-17345 as duplicative but does not note by Bates label or  
15 other identifier what information it is duplicative of. This report is *a year and half* old.

16 The State's response does not address the late disclosed reports from a September  
17 2009 contact about Jim Knapp's alleged suicide and an October 2009 contact with the  
18 Kennedy family regarding depositions. The State also does not address the late  
19 disclosure of a November 2009 contact regarding cell phone and tower information that  
20 the defense has been requesting (17781), a report regarding a contact at Callaway from  
21 July of 2009 (17789), a report regarding contacts with expert Bill Kiviat from August of  
22 2009 (17790), a report relating to a search of a public restroom septic tank from July  
23 2008 (17954), and a report regarding the examination of cell phones that was completed  
24 in May of 2009; disclosure also contains a report of a November 2008 contact with Carol  
25 Tidmarsh (17778), reports of jail calls from September of 2009 (17791) as well as over  
26 1000 pages of jail call summaries dating back to 2008 and 2009 (CD 6163).

1 The State's response claims it has complied with the "spirit" of Rule 15. The list  
2 of above examples is only a partial list and belies the State's hollow claims regarding the  
3 "spirit" of the Rule. The State's failure to address many of these issues is an implicit  
4 acknowledgement of its failures and of the resulting prejudice to Mr. DeMocker who is  
5 left attempt to sort through the tens of thousands of pages of disclosure, hundreds of  
6 audio interviews, thousands of jail calls that the State refuses to identify, and multiple just  
7 disclosed reports of CDs, DVDs, hard drives, thumb drives, ipods, etc. while the State  
8 ignores its obligations under the Rules and this Court's orders. Of course, all this has  
9 occurred while defendant is in jail fighting for his life.

10  
11 *1. Crime Scene Diagrams*

12 The State responds that with respect to crime scene diagrams it has disclosed  
13 materials that were in its possession when a request was made. This is simply not true.  
14 Measurements of the crime scene taken on July of 2008 (17849), diagrams of the crime  
15 scene (17850-51) and CAD drawings of the scene (CD # 6157) were just disclosed for  
16 the first time in February. Requests for this information have been made repeatedly,  
17 including after Detective Brown testified in November. The State has always responded  
18 that no other diagrams exist. This information was specifically requested to assist  
19 defense experts.

20  
21 *2. Shoe Print Reports*

22 The State also falsely asserts that it "promptly" disclosed shoe print reports. The  
23 State sat on the FBI report regarding shoe prints for over three months. This was  
24 inclusive of the time period in January of this year during which the issue of shoe prints  
25 was being litigated in this Court. Furthermore, the State had been in contact with these  
26 witnesses for many months prior to the report and these contacts were not and have not  
27 been disclosed. The prejudice from this late disclosure is that Mr. DeMocker is left, three  
28 months before a trial in which he is fighting for his life, to review, analyze and process

1 the information, as well as to potentially identify and retain defense experts while the  
2 State sat on this evidence for months. The Court should exclude this evidence as a  
3 sanction for the State's inexcusable behavior with regard to this evidence.

### 4 3. *DPS Computer Forensic Reports*

5 The State inexplicably asserts that Mr. DeMocker had all of the ipods, falsh drives,  
6 hard drives, CDs and DVDs examined by the State prior to his arrest. This is simply not  
7 true. Many of these items are from Carol Kennedy and Jim Knapp. While the State  
8 baldly declares there is no prejudice to the defense, it does not deny that it has had these  
9 items in its possession for over 15 months and has only now, three months before trial,  
10 disclosed multiple CDs of forensic analysis of these items. The volume of this disclosure  
11 with three months to trial when the State has possessed these items for eighteen months is  
12 sufficient evidence of the prejudice. The defense has been requesting this information for  
13 months and the State has refused to provide it. The State has interfered with Mr.  
14 DeMocker's ability to review and analyze these reports, research and possibly retain the  
15 appropriate experts and otherwise prepare for trial.

### 17 **III. THE COURT SHOULD DISMISS THE DEATH PENALTY BASED ON** 18 **THE CUMULATIVE EFFECT OF THE STATE'S FAILURES TO** 19 **COMPLY WITH ITS ORDERS AND RULE 15.1.**

20 The Supreme Court requires "extraordinary measures [be taken] to insure that the  
21 [Accused] is afforded process that will guarantee, as much as is humanly possible, that [a  
22 sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell*  
23 *v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S.  
24 104, 118 (1982) (O'Connor, J., concurring)).

25 Given the volume of the late disclosed evidence, to include tens of thousands of  
26 pages, and the number of witnesses, now over 150, with only three months to trial and the  
27 State's repeated, continued and ongoing defiance of the Rules of Criminal Procedure and  
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1 this Court's orders, a sanction is appropriate. Rule 15.7 accords the Court broad  
2 discretion to impose a sanction and the Supreme Court puts this responsibly in the hands  
3 of the trial court. Striking the death penalty as a sanction for repeated violations of the  
4 Rules of Criminal Procedure and Court orders is a sanction that would demonstrate that  
5 the Rules and the authority of the Court are not a paper tiger and will be ignored at the  
6 State's peril. "[I]t is the trial court's responsibly to enforce our disclosure rules. ...  
7 When necessary, trial judges posses the power to invoke sanctions ... for failure to  
8 comply with discovery rules. *Perhaps the time has come to make clear that these*  
9 *sanctions are not merely a paper tiger.*" *Tucker*, 157 Ariz. at 441 (emphasis added).

### 10 CONCLUSION

11 Defendant Steven DeMocker, by and through counsel, hereby requests that this  
12 Court prohibit the State from offering testimony from the late disclosed witnesses or  
13 experts and from introducing late disclosed evidence and strike the death penalty.  
14

15 DATED this 18<sup>th</sup> day of February, 2010.

16  
17 By:



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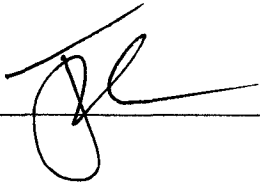
25  
26 **ORIGINAL** of the foregoing  
27 filed this 18<sup>th</sup> day of February, 2010, with:  
28

1 Jeanne Hicks  
2 Clerk of the Court  
3 Yavapai County Superior Court  
4 120 S. Cortez  
5 Prescott, AZ 86303

6 **COPIES** of the foregoing hand delivered this  
7 this 18<sup>th</sup> day of February, 2010, to:

8 The Hon. Thomas B. Lindberg  
9 Judge of the Superior Court  
10 Division Six  
11 120 S. Cortez  
12 Prescott, AZ 86303

13 Joseph C. Butner, Esq.  
14 Prescott Courthouse basket

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